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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 860

LILLIAN SCHLOTMAN,
Petitioner,

vs.

TERRITORY OF ALASKA,
Respondent.

TERRITORY OF ALASKA,
Petitioner,

vs.

LILLIAN SCHLOTHAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit.

The petitioner, appellant below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, for the Ninth Cir-

cuit, which was entered on the 9th day of February, 1960.

OPINIONS BELOW.

There is attached hereto:

1. The opinion of the United States District Court for the District of Alaska, Division Number One at Ketchikan, entered June 21, 1957. (Appendix I, page 1 this petition.)

2. The opinion of the United States Court of Appeals for the Ninth Circuit entered February 9, 1960. (Appendix II, page 16 this petition.)

3. The judgment of the United States Court of Appeals, Ninth Circuit, entered the 9th day of February, 1960. (Appendix III, R. 30.)

JURISDICTION.

This case was originally argued before the United States Court of Appeals for the Ninth Circuit, dated June 1958, Circuit Judges William Healy, James Alger Fee and Frederick G. Hamley. On March 6, 1959, said judges set aside the submission order previously made and provided for a hearing of the matter en banc. On March 30, 1959, the said cause was heard and submitted to the Court en banc. The opinion and judgment of the Court were entered February 9, 1960. Justice Alger Fee died while the matter was under submission.

Appellant-petitioner did not petition the Court for a rehearing for the reason the case was previously argued before a division of the United States Court of Appeals for the Ninth Circuit, and was subsequently reargued at the request of the Court before the Court en banc and the practical effect therefore was an original hearing and a rehearing, and a petition for a rehearing would accomplish no purpose.

The jurisdiction for this Court to entertain this petition and to review the decision of the United States Court of Appeals for the Ninth Circuit is contained in 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED.

Section 4(h) of Chapter 82, SLA,* 1949, as amended by Chapter 113, SLA, 1951, provides that all taxes, penalties and interest under that Act are declared to be a lien prior, paramount and superior to all prior liens, mortgages, hypothecations, advances and assignments upon all the real and personal property of the person or firm liable therefor. The question presented is whether such a statute is constitutional. (Said Chapters above mentioned are attached hereto as Appendix IV, R. 31.)

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*Session Laws of Alaska.

STATEMENT OF THE CASE.

This case involved questions of determination of the priorities of the mortgage lien of Lillian Schlothan placed on the property involved on June 19, 1951, as against a fish license tax lien placed on the property by the Territory of Alaska (hereinafter called "Alaska") on November 2, 1953, pursuant to the provisions of Chapter 82, Section 4(h), Session Laws of Alaska, 1949, as amended by Chapter 113, Session Laws of Alaska, 1951. (Hereinafter called "Alaska Lien Statute".)

Prior to June 19, 1951, Lillian Schlothan owned for over 20 years certain tide and dock property in Ketchikan, Alaska which had been used for storage and warehouse purposes and which had never been used by her as a cannery. On June 19, 1951, Lillian Schlothan sold the property to Sigmund Einstoss for storage purposes, taking back a purchase money mortgage for the full purchase price of the property, to-wit, $25,000.00, and that mortgage was duly recorded by Schlothan on June 28, 1951.

After acquiring the Schlothan property, Einstoss converted it into a cannery and canned salmon there during the remainder of 1951. During this same period, Einstoss also canned salmon in other areas of Alaska.

On March 29, 1954 there was $11,000.00 remaining due on the mortgage and Einstoss was in default, causing Schlothan to institute a foreclosure proceeding. Einstoss died and Mildred Hulce was appointed administratrix of that estate. Thereafter the Alaska

fish tax mentioned was assessed and the lien filed against his estate.

Alaska intervened in the foreclosure proceeding of Mrs. Schlothan, claiming an interest in the property under its tax lien which was recorded November 2, 1953, more than two years after the Schlothan lien. Also Alaska sought some $83,000.00 against Einstoss for unpaid taxes for the years 1950 and 1951, including penalties and interest. Alaska also sought a declaration that their lien, recorded some twenty-eight months after the lien of Lillian Schlothan, was a superior and paramount lien to the Schlothan purchase money mortgage lien.

On December 13, 1956 the trial Court entered a judgment on the pleading in favor of Lillian Schlothan, against Einstoss, in the sum of $14,800.12, together with costs, decreeing a foreclosure of the mortgage but providing that "This judgment does not attempt to decide whether the plaintiff's lien or the lien of the Territory is superior and that question is left for further action by this court."

On January 25, 1957, a stipulation of facts pertinent to the question of the lien priorities was filed and Alaska's motion for summary judgment was argued and submitted. On June 21, 1957 the trial Court handed down an unreported written opinion which is appended to this petition in the Appendix, I, R. 1.

The ruling of the trial Court provided that Alaska's lien for taxes accruing after the date of Einstoss' purchase of the Schlothan property had priority over

the Schlothan purchase money mortgage lien. Further, that the Schlothan purchase money mortgage lien had priority over the lien for taxes which had become due by Einstoss in other operations *prior* to his acquisition of the Schlothan property. The practical results of the judgment of the trial Court was to eliminate the Schlothan purchase money mortgage since the amount of the tax lien far exceeded the value of the property and that therefore Schlothan would not receive the balance of $14,800.12 due her. Income during the period of litigation was deposited in Court.

On October 31, 1957, a formal judgment of the trial Court was entered, effectuating the decision announced in the written opinion.

An appeal was prosecuted to the United States Court of Appeals for the Ninth Circuit by Mrs. Schlothan, and a cross-appeal was filed by Alaska as to those aspects whereby the trial Court denied the Territory a lien for taxes accruing *prior* to Einstoss' purchase from Mrs. Schlothan. The case was originally argued before a division of the Court and subsequently, by action of that division, was referred back to the Court en banc, for further argument. The case was submitted and ultimately the decision of the United States Court of Appeals for the Ninth Circuit was handed down February 9, 1960, affirming the decision of the lower Court to the effect that Alaska's tax lien ***recorded twenty-eight months after the Schlothan purchase money mortgage lien,*** was superior to the Schlothan lien and that therefore all of the Schlothan interest in the property was elimi-

inated or wiped, out, causing her a financial loss in excess of $14,000.00, the balance owed to her.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the constitutionality of Chapter 82, Session Laws of Alaska, 1949 and Chapter 113, Session Laws of Alaska, 1951, which are attached hereto.

1. The statute violates the due process clauses of the United States Constitution.

(a) Chapter 82 violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution since it failed to provide the petitioner with notice of the lien for taxes *or any method of obtaining notice of a lien.*[1]

There is no method prescribed in the statute under attack which would have provided petitioner Lillian Schlothan with any notice of the proposed lien of Alaska, nor any method by which she could have obtained notice of a proposed lien as of June 19, 1951, when she sold her property to Einstoss, taking back the purchase money mortgage and recording same. Since the statute provides no notice which would allow a person to protect themselves it is unconstitutional. Alaska did not notice a lien, nor did it claim any

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[1]The validity of the Alaskan Territorial Statute must be judged by the standard of due process and of equal protection that would be applied to the case of similar legislation by a state. *Alaska Steamship Co. v. Mullaney*, 180 Fed.(2d) 805, and *Hess v. Mullaney*, 213 Fed.(2d) 635.

taxes were due by Einstoss until November 2, 1953, more than two years after Mrs. Schlothan had recorded her mortgage and as far as the record shows, he did not owe any taxes.

(b) The Alaska lien statute is also unconstitutional in that it violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, since it permits *Alaska to issue* fishing licenses or fish *canning licenses year after year to persons* who have *not* paid their taxes and yet permits the Territory to assess a lien for unpaid taxes against the *property* of an *innocent person who has done business with a given licensee in reliance upon the action of Alaska in issuing licenses to a delinquent taxpayer.*

Chapter 82 of the Session Laws of Alaska provides in Section (1) in part as follows:

> "A. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries, shall first apply for and obtain, *on the conditions hereinafter set forth,* a license so to do *on the basis of the following license taxes which are hereby levied."* (Emphasis supplied.)

The statute also requires any such person, firm or corporation engaged in the commercial fishing business in Alaska, to file a tax return on the 15th day of January each year, embracing the business done by that person in the previous year, and to pay the taxes due. It is essential under the Alaska statute, *in order to obtain a license,* to file a tax return on the 15th of each January and to pay the taxes. There-

fore, any innocent person has a right to rely on the fact that if the Territory of Alaska issues such a license, that person has paid his taxes to Alaska.

The record in the instant case discloses that Einstoss had fished or engaged in commercial fishing operations and canning in Alaska in the year 1950 and ran up the grand total of taxes and interest and penalties of $36,128.23. (R. 99 to 100.) Similarly the record discloses that in the year 1951 Einstoss was engaged in the fishing industry and ran up a grand total of taxes with penalties and interest of $59,628.46. (R. 96.)

Thus, although Einstoss had run up taxes of about $36,000 for his commercial fishing operations in the year 1950 and had apparently filed no tax return and paid no taxes, nevertheless Alaska issued him a license for the year 1951 and he was permitted by Alaska to operate in the Petersburg, Ketchikan and Sitka, Alaska areas during that year 1951. (R. 96.)

At the time Lillian Schlothan dealt with Einstoss on June 19, 1951, he had already been operating for a year and a half in the Alaska area, under licenses issued to him by Alaska. Since the Alaska statute requires filing and payment of taxes by January 15th of each year, Lillian Schlothan had the right to presume that the statute had been complied with, otherwise Alaska would not have issued him a license in the year 1951.

Section 3(b) and (c) of the Chapter permit the Tax Commissioner to grant reasonable extensions of time for the filing of returns and the payment of taxes *under such rules and regulations as the Tax Commis-*

sioner may prescribe. Therefore, again an innocent person has a right to assume that the law has been complied with and that in the event Einstoss had not paid his taxes that the Territory had issued him a new license for the year 1951 under such rules and regulations as the Tax Commission had prescribed, which would have protected the Territory *without* recourse to the property of an innocent person.

Since the Alaska statute herein attacked does not provide persons with any notice of the purported lien, nor any method by which a person could investigate and acquire notice and further permits the Territory to issue *licenses year after year* to persons engaged in the commercial fishing industry *who have not paid their taxes* and thereafter allows the Territory to assess a lien without notice against an innocent person, the statute is unconstitutional.

Tax returns filed by individuals with governmental bodies are inherently privileged and no employee of that agency is permitted to show or otherwise disclose the matters contained in said tax returns to any other member of the public. Thus *the only method that an Alaska resident would have to determine whether a person has complied with the Alaska statutes concerning commercial fish taxes would be the act of Alaska in issuing a new license for the ensuing year.* Since the Alaska statute requires the tax return to be filed by January 15th and the taxes paid, and since residents of Alaska have no access to an examination of those returns, said persons have a right to rely on the conduct of the government of Alaska (of issuing a new

license) as implied notice to the public that that person who is licensed has paid his taxes.

Since the statute in question does not meet these requirements and does not provide said notice, it is unconstitutional.

(c) The Alaska lien statute, and particularly Section 4(h) violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution *in that it is so harsh, unjust and unreasonable as to constitute an affront to justice.*

The United States Court of Appeals for the Ninth Circuit in its opinion found that this statute was unquestionably harsh, particularly as relates to Mrs. Schlothan under the particular facts and circumstances. Further, the United States Court of Appeals found that the two states where similiar statutes had been upheld (New York and Kansas), the lien statute had either been completely repealed or greatly limited. (App. p. 23 and 25.)

Further the trial judge in the Territorial Court considered the lien provisions of the Alaskan statute to be harsh in stating:

> "In the present case, the Territory's limited sources of revenue might well justify giving it a higher degree of security for the collection of taxes, but in other respects, I believe that the reasons for the existence of the lien *are less compelling* than in the Goodrich case." (Emphasis supplied.)

The Goodrich case cited was *International Harvester Credit Corp. v. Goodrich*, 350 U.S. 537.

Further, it was pointed out in the opinion of the United States Court of Appeals, the following:

> "At the trial Court hearing, the Assistant Attorney General of the Territory of Alaska expressed the hope of his office that the Legislature of Alaska would amend the law to delete this harsh provision. The Legislature also has within its power, if it wishes to do so, to return to Mrs. Schlothan the sums collected at the expense of her mortgage."

It has therefore been concluded at all levels of the Courts where this matter has been litigated that the Alaska statute providing for imposition of paramount liens, is a very harsh law.

In the case of *Burnett v. Wells,* 289 U.S. 70, Justice Cardozo established a rule which suggests that the test of due process as to any statute "was one that enlightened legislators might act upon without an affront to justice."

In applying the "affront to justice" doctrine in the *International Harvester Credit Corp. v. Goodrich* case, supra, this Court assigned three reasons why the statue in the *International Harvester* case was not an affront to justice, to-wit:

> 1. The lien in the New York State statute was deemed to be reasonable because both the carriers and the truck manufacturers benefited from the construction and maintenance of highways which were built from the proceeds of the tax involved;
>
> 2. The burden placed upon the highways by an encumbered truck was just as great as the burden placed upon the highways by an unencumbered truck;

3. That there is a need for effective lien to enforce a tax which cannot be computed or readily collected in advance.

The most compelling reason why the New York lien statute was deemed constitutional was the fact that both the carriers and the truck manufacturers benefited from the construction and maintenance of highways which were built from the proceeds of the tax. But for highways, the truck manufacturers or the truck operators would not be able to do business. *Thus there was a substantial and direct benefit provided by the statute to said truck manufacturers or carriers, and therefore the statute was deemed to be reasonable.*

Applying the reasoning assigned in the *International Harvester Credit Corp.* case, supra, to the Alaska case at bar, it can readily be observed that neither the first nor second points appear. The Alaska statute in nowise renders any direct or substantial benefit to Lillian Schlothan, since the taxes collected by Alaska in the commercial fish industry are not earmarked for a particular purpose. The burden is not equal (as it was found to be equal in the New York case) since the Alaska lien statute affects only creditors of persons engaged in the commercial fishing industry, but does not affect creditors of other persons in Alaska. The Alaska lien statute permits Alaska to issue licenses to persons to engage in the commercial fishing industry year after year, without the payment of taxes by those persons, despite the fact that the statute constructively notifies the public that by the issuance of such a license the tax obligation has been

paid. Similar facts do not exist in the *International Harvester* nor the *Fruehauf Trailer Co.* cases. (*Fruehauf Trailer Co. v. State Corporation Commission*, 149 Kan. 465, 87 Pac.(2d) 641.)

In summary, it is respectfully submitted that the Alaska lien statute is violative of the Fifth and Fourteenth Amendments of the United States Constitution in that (a) it does not provide any notice to the public of the imposition of the lien; (b) it does not provide the public with any means of obtaining notice but permits the public to be deceived into believing that the tax has been paid by the issuance of the subsequent license; (c) the statute is so harsh as to constitute an affront to justice under the doctrine of *Burnett v. Wells*, supra.

2. The statute violates the equal protection of the law clauses of the United States Constitution.

(a) The Alaska lien statute is unconstitutional in that it denies the equal protection of the laws to the petitioner herein. This Chapter subjects contract encumbrances or creditors dealing with persons engaged in the commercial fishing business to a prior lien for taxes, but does not subject other contract encumbrancers or creditors doing business with persons engaged in other industries in Alaska with similar burdens. Further the prior lien permitted by the Alaska lien statute permits the lien to attach for any commercial fishing operations in any area of Alaska, but does not permit the public any means of acquiring notice of the lien. On the contrary it permits the Territory to mislead the public into believing that taxes have

been paid by the issuance of a succeeding license each year without the necessity of the payment of the taxes.

Under this Alaska lien statute it would permit a contract encumbrancer to sell his property to a person *not engaged in the fishing industry* but which person may two or three years later become engaged in the fishing industry, unknown to the contract encumbrancer or mortgagee, and thereby expose a security encumbrance of the mortgage, regardless of the vigilance of that person. This was observed by the trial court in its opinion (Appendix I, R. 1). For this Court to determine the reasonableness of a statute in order to determine the constitutionality thereof, either as to due process of law or the equal protection clauses, it is necessary for the courts not only to take judicial notice of the great importance of the collection of taxes to the given community, but also it is important *to take judicial notice of who is in the better position to protect themselves—the government involved or the individual citizen.*

In the instant case, Alaska is in a better condition to protect itself by refusing to grant a license for the ensuing or following year until such time as the person engaged in the commercial fishing industry has filed his tax return and paid his taxes for the previous year. This fact is best illustrated by the enactment of the Alaska Legislature of Section 3 of the act in question, which allowed the Tax Commissioner to grant reasonable extensions of time for filing returns *under such regulations as he may prescribe,* thus if any person engaged in the commercial fishing

industry in Alaska desired an extension of time to file a return or pay the tax, the Tax Commissioner was accorded the authority by the Territorial Legislature to prescribe the rules, regulations or conditions upon which any such extension would be granted. The obvious condition imposed would be the withholding of the commercial fishing license pending the filing of the return and the payment of the taxes or giving security therefor.

The Alaska Legislature placed within the power of the Tax Commissioner of Alaska the method and means of controlling the collection of the taxes and at the same time permitted him to refuse the issuance of a license until such time as the taxes were paid.

It is obvious that Alaska was in a better position to protect itself. To uphold the validity of the Alaska lien statute is to permit the citizens of Alaska to be deceived. When such persons do business with a person who holds a license from the Territory of Alaska to engage in commercial fishing operations, others have a right to believe that the Territory has seen that said person has paid his taxes required by the statute. No one in Alaska can make a mortgage or do business with any one without the exposure that eventually, be it 1 or 20 years later, the property involved may be subject to this harsh unconstitutional lien.

For the reasons herein assigned, the statute effects an unequal burden and denies to the citizens of Alaska the equal protection of the law, because it permits the

citizens to change their position in reliance on the action of the government of Alaska in issuing new licenses each year.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The United States Supreme Court should grant this Writ of Certiorari to test the constitutionality of the Terriory of Alaska's law, Chapter 82, Session Laws of Alaska, 1949, as Amended by Chapter 113, Session Laws of Alaska, 1951, for the following reasons:

(a) *That the statute violates the Fifth and Fourteenth Amendments of the United States Constitution and constitutes a violation of the due process of law clauses.*

1. The statute provides no notice to the public of the lien;

2. The statute provides no means by which the public can acquire notice of the proposed lien;

3. The statute is so harsh as to constitute an affront to justice.

(b) *That the statute violates the United States Constitution in that it denies to the citizens of Alaska the equal protection of the law.*

1. It permits a burden to be imposed upon creditors or encumbrancers doing business with members of the commercial fishing industry, but does not impose an equal burden on creditors or encumbrancers doing business with other citizens.

2. It permits Alaska by its action in issuing a new license to lead the public into believing that the law has been complied with, but the public

may find out years later that the law has not been complied with, when Alaska imposes its lien for taxes accruing *after* a business transaction has been made.

Dated, San Francisco, California,
March 28, 1960.

Respectfully submitted,
BARNETT & ROBERTSON,
PHILIP BARNETT,
RODNEY ROBERTSON,
Attorneys for Petitioner
Lillian Schlothan.

(Appendices I, II, III and IV Follow.)

Appendix I

In the United States District Court for the District of Alaska
Division Number One at Ketchikan
No. 3412-KA

Lillian Schlothan,
Plaintiff,
vs.
Sigmund Einstoss, and The Territory of Alaska,
Defendants.

OPINION

Filed June 21, 1957

Lester O. Gore, of Gore & Jernberg, Ketchikan; and Phillip Barnett, of Barnett & Robertson, San Francisco, for plaintiff.

Attorney General, Territory of Alaska, and David J. Pree, Assistant Attorney General, for defendant Territory of Alaska.

This is an action brought by the plaintiff to foreclose a purchase money mortgage given by the defendant Sigmund Einstoss to secure the payment of some $11,000.00 with interest, the unpaid remainder of a $25,000.00 note which was given in payment for certain tideland property in Ketchikan, Alaska. The defendant Territory of Alaska was joined in the complaint because of its claimed interest in the property by virtue of a Territorial tax lien, notice of which was recorded November 2, 1953, for taxes accruing in the years 1950 and 1951 in the total sum of $59,582.92 plus penalties and interest. The territory filed a cross claim against the defendant Einstoss for this sum and prayed for enforcement of its lien. On motion of the plaintiff, judgment was entered for foreclosure of the mortgage upon the pleadings. The order and judgment heretofore entered provided for a summary

judgment on behalf of the defendant Territory of Alaska pursuant to Rule 56 Fed. R. Civ. P. against the defendant Sigmund Einstoss in the amount of $83,402.47, together with 6% interest on the sum of $59,582.93 from and after May 1, 1954. The judgment also provided that the Territory of Alaska have a lien upon all the property of Sigmund Einstoss wherever located. The judgment on the pleadings further provided as follows:

> "... That the Territory of Alaska has appeared in this action and claims a lien upon all of said described property and alleges its lien to be superior to plaintiff's lien; that this judgment does not attempt to decide whether the plaintiff's lien or the lien of the Territory is superior. That question is left for further action by this Court."

It is upon this question, left unsettled in the judgments and decrees heretofore entered, that this matter is now before this Court.

An order was entered on December 21, 1956, staying the enforcement of the judgment and decree until this question is disposed of, and providing, if a sale of the property by agreement between the parties was had, the proceeds therefrom would be deposited in the registry of the court.

On January 25, 1957, a stipulation of facts was filed and on January 29, 1957, an order was entered requiring the present occupants and users of the premises to pay the rent therefor to the Clerk of the District Court.

The Court requested briefs from the Attorney General, representing the Territory of Alaska, and granted permission to counsel for the plaintiff to file briefs upon this question.

The stipulation of facts reveals that prior to June 19, 1951, plaintiff was the owner of the tideland property and the improvements thereon, the subject matter of this litigation, and that at that time the property was owned by the plaintiff free and clear of any and all liens, mortgages, or deeds of trust. Prior to the date of the sale of this property it was used for the manufacture of wire netting by the Alaska Steel and Wire Company, which company was a corporation operated by plaintiff's husband, William Schlothan, for some 20 years. On or about January 27,

1951, the corporation was dissolved, the Alaska Steel and Wire Company having ceased operation of its wire netting manufacturing, and from the time of said dissolution until the sale of the property by the plaintiff it was used for storage and warehouse purposes only.

Early in 1951 the defendant, Sigmund Einstoss, approached the plaintiff and her attorney, Phillip Barnett, with the idea of purchasing the property and the improvements thereon for use as a storage and warehouse building. At that time defendant Einstoss was engaged in the fishing and canning business throughout Alaska, including the operation of a salmon cannery at the north end of the City of Ketchikan. This operation was conducted on property known as the Bertosen property and was known locally as the "Einstoss Cannery." Einstoss needed additional space for storage and warehouse purposes. As a result of long negotiations, on June 19, 1951, plaintiff executed a quitclaim deed to the property, taking back a purchase money mortgage as security for the payment of the balance due under the terms and conditions of sale. Plaintiff was aware of the cannery operations of Einstoss. At no time prior to the sale of the property in 1951 to Sigmund Einstoss did the defendant or anyone else use the property as a cannery.

Shortly after the acquisition of the Schlothan property by Einstoss he secured salmon cannery equipment and converted the use of the buildings thereon for cannery purposes and in fact canned salmon on the property during 1951 as well as using the property for storage and warehouse purposes.

Defendant Einstoss defaulted in the terms of his mortgage and on March 29, 1954, proceedings were instituted to foreclose the mortgage. Einstoss died and Mildred Hulce was appointed administratrix of his estate.

On November 2, 1953, the defendant Territory of Alaska filed a notice of tax lien in the Office of the Recorder for the Precinct of Ketchikan where this property is located. This notice of tax lien was against defendant Einstoss. At no time prior to November 2, 1953, was any actual notice of any kind or character ever given to the plaintiff of the existence of any lien or of any taxes due the Territory from Einstoss. The Territorial lien is

based on the provisions of the commercial fisheries license tax provided for in Ch. 82, SLA 1949 as amended by Ch. 113, SLA 1951.

The stipulation of facts sets forth that the taxes owed by Einstoss were for operations in various parts of Alaska as follows:

Petersburg, Alaska, 1950 tax claimed	$ 3,018.40
Ketchikan, Alaska, 1950 (not on property herein described but other parts of Ketchikan)	10,833.13
Other locations in Alaska, 1950	8,110.92
Petersburg, Alaska, 1951	20,802.41
Other parts of Alaska, including Ketchikan, 1951	16,818.07

What portion of the $16,818.07 is the result of the operation of the defendant Einstoss on the mortgaged property herein described is not revealed; nor was it shown what part, if any, of the above taxes for 1951 accrued after the Schlothan property was transferred on June 19, 1951, to the tax debtor, Einstoss. This, likewise, could be determined by the Territory from its records.

The general question here involved is the extent to which commerical fishery license taxes owing to the Territory by virtue of the statute can be given priority over a purchase money mortgage on property acquired by the tax debtor. The issues are threefold, based upon the different origins of the taxes involved:

(1) Can the license taxes accruing from the canning operations at the property here involved be given priority over the purchase money mortgage?

(2) Can the license taxes accruing after the acquisition of the property here involved from other different and separate canning operations be given priority over the purchase money mortgage?

(3) Can license taxes accruing from other separate operations *before* the acquisition of the property here involved be given priority over the purchase money mortgage?

The Territory contends that each of these questions must be answered in the affirmative, based upon Sec. 4(h) of the Act:

"(h) Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business; • • •"

In support of their contentions, the defendant Territory of Alaska cites *United States v. Snyder*, 149 U.S. 210, (1893) and *Territory of Alaska v. The Arctic Maid* (D.C. Alaska 1956) 140 F. Supp. 190, the so-called "freezer-ship cases" decided by Judge Hodge, of this court, on March 14, 1956. However, the application of Sec. 4(h) in the "freezer-ship cases" was entirely different than in the present case. Judge Hodge determined that a fisheries license tax against the owner of a vessel became a first lien upon his property, and followed the vessel into the hands of a purchaser who had no actual knowledge of the encumbrance. In the present case, the tax is charged to the purchaser and not the seller. The Territory seeks to subordinate the seller's equity to the tax lien.

The Supreme Court held in the case of *United States v. Snyder*, supra, that a tax imposed by Congress is not subject to the recording laws of Louisiana.

As can readily be seen, these cases do not answer the troublesome problem here facing the Court.

With regard to the taxes accruing in 1950 and 1951, prior to the purchase of the Schlothan property by defendant Einstoss, the Territory contends that the lien upon "all the real and personal property of the person • • • liable therefor" would include this property and be a superior lien to the Schlothan mortgage. Obviously the taxes which accrued prior to the purchase of the property here involved were not a lien on Schlothan's property when they accrued, for Einstoss had not yet purchased the property. Could property purchased thereafter be made subject to the tax lien beyond the buyer's interest therein and superior to the purchase money mortgage? In the absence of specific wording in

the act extending the lien to after-acquired property, it clearly could not.

Cooley, in his treatise, *The Law of Taxation*, Vol. 3, Sec. 1230, (4th ed. 1924), states the rule as follows:

> "If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species. *And if in terms it makes the tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights owned when the tax accrued.*" (Emphasis supplied)

Other authorities in accord with this statement are:

Libby, McNeill & Libby v. City of Yakutat, Alaska, (9th Cir. 1953) 206 F. 2d 612

Yarborough Bros. Hardware Co. v. Phillips, 209 Ala. 341; 96 So. 414 (1923)

Board of Com'rs. of Natrona County v. Shaffner, 12 Wyo. 177, 74 Pac. 88 (1903)

Farm & Cattle Loan Co. v. Faulkner, 242 Pac. 415, 34 Wyo. 199 (1926)

State v. Swensk, 161 Or. 281, 89 P. 2d 587 (1939)

33 *Am. Jur.*, Liens, Sec. 13, p. 425.

In the present case the lien is given priority over all other encumbrances upon all the real and personal property of the person, but there is no specific provision for a prior lien on after-acquired property. Accordingly, the Territory's lien for taxes accruing prior to the acquisition of the property from Schlothan is subject to the purchase money mortgage.

There is no doubt that the taxes which are allocable to the canning operations on the property in question may be made a first lien upon that property. The reason for such a rule was aptly stated in *Thomas v. Jones*, 94 Va. 756, 27 S.E. 813 (1897):

> "That taxes are prior in dignity to all other liens must be so from the very necessity of the case; otherwise the state would be powerless to collect her revenue. The liens upon land would, as in the case at bar, often be greater than the value of the land, and, the tax lien being inferior, the land would escape all taxation."

Likewise, the authorities agree that taxes may be declared a lien against all the owner's real and personal property, without giving priority, however, over encumbrances on the property other than that against which the tax is assessed. The rule is summarized in 3 *Cooley, The Law of Taxation*, Sec. 1236 (4th ed. 1924):

> "The rule in most of the states is that the lien on each tract of land is for the taxes against such tract only, but in some states the statute is found to go even further than this, and to give a lien on the land for taxes assessed against its owner in respect to any of his property, real or personal. The constitutionality of this legislation is unquestionable."

Cooley refers, of course, to a property tax, whereas in this instance, a license tax is involved. But the portion of the total license tax which is chargeable against each cannery is certain and ascertainable, and in that respect it is analogous to a property tax upon the individual properties themselves.

A more difficult problem is presented, however, when taxes allocable to one cannery are sought to be impressed as a prior lien on a different cannery which is subject to a pre-existing encumbrance. To do this would render it possible for a lien upon one piece of property to be extinguished by taxes arising from the activities carried on at an entirely different location, regardless of the vigilance of the lien-holder. This Court is not unmindful of the presumption that a person contracts "with reference to the liability imposed by the law, and is presumed to have knowledge of it and to govern himself accordingly in such contracts as he may choose to make." *Donaldson v. Henning*, 4 Alaska 642 (1913). In fact, reasonable arguments could be advanced that in this case it is not inequitable to impose the Territory's lien upon the property superior to Schlothan's purchase money mortgage. Being charged with notice of the existence of the statute, and having actual knowledge that Einstoss was engaged in the canning business, the use of the property for canning purposes and the resulting accrual of taxes were not remote possibilities.

In a different situation, however, the sale could have been made to a person who had not previously engaged in any of the activities subject to the license tax, but who thereafter entered the canning business, or resold the property to a third person who

was in the canning business. The harshness of this law is apparent. Anyone who takes a lien upon real or personal property in the Territory would do so with the understanding that his lien could be entirely wiped out by subsequent events which he would have no way of controlling. Moreover, assuming, but without deciding, that the legislature intended this lien to extend not only to all the real and personal property of the person liable therefor which was used in the business, but also to include all his other property of whatever nature, the scope of this law would be greatly expanded. Every credit sale of furniture or an automobile would be consummated under the spectre of the fisheries license tax. A citizen could even sell his home to a neighbor who had never engaged in the cannery business whatsoever and as part of the purchase price take back a mortgage, which would certainly then be a first lien upon the property. That person might thereafter engage in the cannery business and incur a tax indebtedness to the Territory, and the mortgage interest of the original owner of the property could be wiped out; or, that neighbor could transfer that home by deed to another who incurred cannery taxes, and again have the mortgage of the original owner, which is a valuable property interest, entirely wiped out. Would legislation giving a prior lien on encumbered property other than that from which the tax arose constitute the taking of one man's property to pay the debt of another, and thus deprive him of property without due process of law? It has been suggested in several cases, notably *Scottish American Mortgage Co. v. Minidoka County*, 47 Ida. 33, 272 Pac. 498 (1928) and *Advance Thresher Co. v. Beck*, 21 N. Dak. 55, 128 N.W. 315 (1910) that a statute creating such a lien would be of doubtful constitutionality. In each of these instances, however, the courts refused to impute to the legislature the intention of creating a prior lien on property other than that taxed, and therefore the constitutional issue was not decided.

However, the dicta in the *Scottish American Mortgage Co.* and the *Advance Thresher Co.* cases was impliedly rejected by the Supreme Court in the case of *International Harvester Credit Corporation v. Goodrich*, 350 U.S. 537 (1956) involving the New York Highway Use Tax Act, which taxed carriers for their use of New York highways based upon the weight of the vehicle and

the distance traveled over such highways. Sec. 506 of the New York Code provided:

> "Sec. 506. Payment of tax. • • • The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit."

In 1953, Eastern Cartage and Leasing Company, Inc., a carrier subject to the tax, purchased two trucks from International Harvestor Co. and one truck from Brockway Motor Company, Inc. Each of the purchases was by a conditional sales contract, and those pertaining to the two sales by International Harvester Co. were duly assigned to plaintiff, International Harvester Credit Corp. Upon default by Eastern, the three trucks were repossessed. Thereafter, on April 21, 1954, the State asserted a lien for unpaid Highway Use taxes which had accrued against Eastern from January 1, 1952, through February, 1954.

In ruling that the prior lien, as measured by taxes on the carrier's operation of trucks other than the three in question, as well as taxes arising before the purchase of the trucks, was constitutional, the Supreme Court treated the lien provision as an amendment to the New York Uniform Conditional Sales Act, and compared it with a landlord's lien for unpaid rent, which is "enforceable against personal property found on the premises in the possession of the tenant, even though the legal title to such personal property may be in a third party who has allowed the tenant to have possession and beneficial use of it."

Quoting Justice Cardozo in *Burnet v. Wells*, 289 U.S. 670, 677-678, the Supreme Court suggested that the test of due process was whether the statute was "one that an enlightened legislator might act upon without affront to justice."

As applied to the particular facts of the case it was determined that:

(1) the lien is reasonable because both the carriers and the truck manufacturers benefit from the construction and maintenance of the New York highways, to which the proceeds of the tax are devoted;

(2) the burden placed upon the highways by an encumbered truck is just as great as that by an unencumbered truck;

(3) there is need for an effective lien to enforce a tax which cannot be computed or readily collected in advance.

In the present case the Territory's limited sources of revenue might well justify giving it a high degree of security for the collection of taxes, but in other respects, I believe that the reasons for the existence of the lien are less compelling than in the Goodrich case. For example, the benefit to the subordinated lienholder under the commercial fisheries license tax is only that benefit which all citizens derive from an increase in the general tax fund. On the other hand, the revenue from the New York Highway Use Tax is devoted to the building and maintaining of highways—a distinct benefit to the manufacturers of trucks. Furthermore, a truck manufacturer is fully cognizant of the use to which his products will be put, while the vendor of property in Alaska would ordinarily be much less able to foresee the use of that property in an activity subject to the commercial fisheries tax. However, it does not appear that these distinctions are of such significance that, in the light of the Goodrich decision, the statute in question can be said to constitute an "affront to justice."

Other authorities lend support to the conclusion that this lien provision is within the scope of legislative power. In 84 *C.J.S.*, *Taxation*, Sec. 600, p. 1210, it is stated:

"• • • where the statutes put all tax liens on the same plane, making no distinction between the lien which exists on land for the tax on personalty and the lien which exists for the tax on the land itself, making both paramount to other liens, or where a statute provides that the tax on personal property shall be a lien on the owner's real property not to be removed until the tax is paid or the property sold for the tax, a personal property tax is a lien on the real estate of the

person assessed superior to the lien of a prior mortgage; and likewise, this is true where a statute expressly provides that the tax for personal property charged on real property shall have priority over any other lien."

In 51 *Am. Jur.*, Taxation, Sec. 1016, p. 887, it is stated:

"'It is doubtless competent for the legislature not only to make taxes a lien upon all the property of the owner of the property taxed, but to make such liens a first lien upon the property of the taxpayer, giving them priority over a mortgage or any other lien existing against the property, whether created before or after the assessment of the tax;"

See also *Getchell v. Walker*, 129 Or. 602, 278 Pac. 93 (1929) and *Homeowners' Loan Corporation v. City of Phoenix*, 51 Ariz. 455, 77 P. 2d 818 (1938).

The plaintiff raises the further issue that the statute violates the due process clause because it failed to provide her with notice. She relies upon the case of *Anderson v. Great Northern Ry. Co.*, 25 Ida. 433, 138 Pac. 127 (1914), which passed upon the lien created in Sec. 1 of Ch. 266 of the Session Laws of Idaho for 1911. The Supreme Court of Idaho held the law to be invalid and void, and stated in its decision as follows:

"No process is 'due process' which does not give notice, either actual or constructive; and no 'taking of property' for debt is lawful, unless the debt has been created with the knowledge and consent of the debtor. This knowledge and consent may be constructive so far as it is necessary to create a charge against property, but the statute which furnishes the constructive notice must provide process by which the claims may be measured and established, so the property owner may have a ready and certain method of knowing or ascertaining his liability. No such method is furnished by the statute under discussion . . ."

However, as Judge Hodge pointed out in the "freezer-ship cases" supra:

"It is not necessary that notice of lien be recorded, docketed or filed in the absence of statute requiring such. 53 *C.J.S.*, *Liens*, Sec. 6, p. 850; *U.S. v. Curry*, 201 F. 371."

It is well established that the statute itself is constructive notice of the rights and obligations which it confers.

In *Anderson National Bank v. Luckett*, 321 U.S. 233, 243 (1944), the court held:

> "All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. *Reetz v. Michigan*, 188 U.S. 505, 509; *North Laramie Land Co. v. Hoffman*; 268 U.S. 276, 283. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting land owners, are familiar examples. *Huling v. Kaw Valley Co.*, 130 U.S. 559, 563-564; *Ballard v. Hunter*, 204 U.S. 241, 254-257, 262."

The requirement of the Idaho court that the property owner have a ready and certain method of knowing or ascertaining his liability appears to be at variance with the conclusion of the Supreme Court in *Hodge v. Muscatine County, Iowa*, 196 U.S. 276, 281 (1905) and *International Harvester Credit Corp. v. Goodrich*, supra. In the latter case, not only did the vendors of motor vehicles lack a source for determining what taxes were charged against the vendees, but a statute made it a misdemeanor for state employees to disclose information concerning tax delinquencies, and yet the due process clause was not found to have been violated.

The Court can come to no other conclusion than that the legislature has the power to declare taxes allocable to one piece of property, a prior lien on other property of the taxpayer, and that it has validly exercised such power in this instance. The words of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 159, 209, (4 Wheat. 316, 427) (1819) are appropriate:

> "That the power of taxing • by the states may be exercised so as to destroy • is too obvious to be denied • •."
>
> "• • • the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to

carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

"The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."

In the present case it is the tax lien, an integral part of the taxing power, which has aggrieved the plaintiff. As was pointed out in the Goodrich case, supra, the power to impose a tax lien is subject to the test of "reasonableness," and is not unlimited, but within the broad scope of "reasonableness," the taxpayer is equally dependent upon the legislature with regard to liens as he is with regard to the tax itself.

I agree with the Supreme Court of South Dakota, which stated in the case of *Minneapolis Threshing Mach. Co. v. Roberts County*, 34 S.D. 498, 149 N.W. 163, 165 (1914):

"The results complained of are presumed to have been in the contemplation of the parties when the contract was made. If the statute is obnoxious because it acts as a restraint upon the free exchange or alienation of personal property, or renders it unsafe to deal in such property, then it should be repealed or amended, but this relief must be sought from the legislature and not from the court."

The power to tax is exclusively a legislative function and has not been extended in any manner to the judiciary. If the tax is bad, burdensome, vicious, or destructive, the only remedy, if any exists, is by appeal to the legislature and not to the courts.

This division of authority between the legislature and the judiciary was illustrated in the State of Arizona. In the case of *Maricopa County v. Equitable Life Assur. Soc.*, 42 Ariz. 569, 28

P. 2d 821, (1934), a statute similar to Sec. 4(h) of the fisheries license tax act was given full effect by the court. *Homeowners' Loan Corporation v. City of Phoenix*, supra, a subsequent case also involving a conflict between a prior mortgage lien and a tax lien, pointed out that the legislature had amended the lien provision after the Maricopa County decision, and as a result, tax liens were made subject to pre-existing encumbrances on all property except that against which the tax was assessed.

> "As long as the legislature, in imposing a tax, does not violate applicable constitutional limitations or restrictions, the courts have no concern with the wisdom or policy of the exaction imposed, the political or other collateral motives behind it, the amount to be raised, or the persons, property or privileges to be taxed, such matters being exclusively for the law-making body, whose action will not be reviewed by the judiciary. A court may appropriately determine whether the property taxed was or was not within the taxing power, but if within the taxing power, the court may not determine that the power has or has not been discreetly exercised.
>
> "In the matter of raising revenue for the government, it has been said, the courts cannot set up their judgment against the legislative judgment in determining who shall be required to contribute. The remedy for oppressive taxation does not lie with the judicial branch of the government, and the judicial power may not be invoked to correct oppressive taxation. Where, however, the legislature transcends its functions and violates one or more of the restriction or limitations placed upon the taxing power by the Constitution, the judiciary has the right and duty to interpose and declare the attempted imposition invalid." 51 *Am. Jur., Taxation*, Sec. 47, p. 77-78.

In order to hold an act of the legislature in violation of the guarantees of the Constitution a court must find an abuse of power so unreasonable that the individual is deprived of rights no government may deny.

> "When a legislative body having power to tax a certain subject matter actually imposes such a burdensome tax as effectually to destroy the right to perform the act or to use the

property subject to the tax, the validity of the enactment depends upon the nature and character of the right destroyed. If so great an abuse is manifested as to destroy natural and fundamental rights which no free government could consistently violate, it is the duty of the judiciary to hold such an act unconstitutional. In any other case, however, since the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow that if a tax is within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." 51 *Am. Jur.*, *Taxation*, Sec. 49, pp. 80-81.

This Court finds that it was not the intention of the legislature to impose a lien upon after-acquired property beyond the interest of the taxpayer therein; that the lien for taxes accruing prior to the date the taxpayer acquired this property and executed the mortgage on June 19, 1951, does not create a lien superior to the mortgage involved in this litigation.

I find that the cannery taxes accruing from the use of the property here involved as a cannery after the acquisition of said property by the defendant Einstoss create a lien superior to that of the mortgage; and, likewise, that other cannery taxes accruing after the acquisition of said property on June 19, 1951, and arising from the use of property elsewhere in the Territory, for which the defendant Einstoss became liable, are also a lien upon the property superior to the mortgage.

Therefore, the priorities would be

First: Fisheries license taxes, including penalties and interest, owing to the Territory from the operation of any of defendant Einstoss' canneries since June 19, 1951; and

Second: Balance of the note held by the plaintiff.

The foregoing shall constitute findings of fact and conclusions of law unless either party desires additional findings, in which event the same may be presented on motion. Judgment and decree may be entered in accordance with this opinion.

Raymond J. Kelly
U. S. District Judge

Appendix II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LILLIAN SCHLOTHAN, *Appellant,* vs. TERRITORY OF ALASKA, *Appellee.*	No. 15,817
TERRITORY OF ALASKA, *Appellant,* vs. LILLIAN SCHLOTHAN, *Appellee.*	Feb. 9, 1960

Appeals from the District Court for the District of Alaska, First Division

Before: CHAMBERS, Chief Judge, STEPHENS, POPE, FEE, BARNES, HAMLEY, HAMLIN, and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

This mortgage foreclosure case presents questions concerning the priorities as between a statutory lien of the Territory of Alaska for unpaid license taxes and a purchase money mortgage. The trial court determined by summary judgment that the tax lien had priority as to some, but not all, of the unpaid taxes. The mortgagee has appealed, and Alaska has cross-appealed.

The facts are not in dispute. Prior to June 19, 1951, Lillian Schlothan was the owner of certain tidal and dock property in Ketchikan, Alaska. The property was then being used for storage and warehouse purposes and had never been used as a cannery.

On the indicated date she sold this property to Sigmund Einstoss, executing a quitclaim deed and taking back a purchase money mortgage for the full purchase price of $25,000. The mortgage was duly recorded on June 28, 1951.

Einstoss was then and for some time had been engaged in the fishing and canning business throughout Alaska. Shortly after acquiring the Schlothan property, he converted it into a cannery and canned salmon there during the remainder of 1951. During this period, as before, he also canned salmon at other places in Alaska.

On November 2, 1953, Alaska filed a notice of tax lien against Einstoss in the office of the recorder for the precinct of Ketchikan. The lien, which is provided for by Sess. Laws Alaska (1949), chapter 82, § 4(h) as amended by Sess. Laws Alaska (1951), chapter 113, was to secure payment of license taxes upon Einstoss' salmon cannery operations throughout Alaska for 1950 and 1951.[1] At no time prior to the filing of this notice of tax lien did Lillian Schlothan or her agents know that unpaid cannery license taxes had accrued against Einstoss. Nor did she or her agents, prior to that time, have knowledge of any lien against Einstoss' property for unpaid taxes, or of any claim by Alaska against the property in question.

On March 29, 1954, at a time when $11,000 remained due on the purchase money mortgage, Einstoss defaulted on the terms of the mortgage. Lillian Schlothan then instituted this foreclosure proceeding. Einstoss died and Mildred Hulce was appointed administratrix of his estate.

Alaska intervened because of its claimed interest in the property under the tax lien notice of November 2, 1953. The Territory filed

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[1]Section 4(h) of chapter 82, Sess. Laws Alaska (1949), as amended, under which the tax lien is asserted, reads as follows:

"(h) Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon, are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business . . . ."

a cross-complaint against Einstoss to recover the sum of $83,402.47. Of this sum, $59,582.93 represents unpaid taxes for 1950 and 1951, $14,895.73 represents penalties, and $8,923.81 represents interest to May 1, 1954, and the cost of the lien notice. The territory also sought a decree foreclosing its lien with a declaration that it was prior and superior to any right, title, or interest of Lillian Schlothan in the property in question.

On December 13, 1956, the court, pursuant to a motion of Lillian Schlothan for judgment on the pleadings, entered a judgment in favor of her and against Einstoss in the sum of $14,800.12 and costs. Foreclosure of the mortgage was decreed. It was further provided that "this judgment does not attempt to decide whether the plaintiff's lien or the lien of the Territory is superior, and that question is left for further action by this Court."

On the same day the trial court granted a motion for a summary judgment filed by Alaska on November 26, 1956. In this judgment Alaska was awarded recovery against Einstoss in the amount of $83,402.47. It was also recited therein that Alaska's tax lien is "prior, paramount and superior to any right, title, claim, lien, or interest of the plaintiff in defendant, Sigmund Einstoss', property." It was further provided that the property be foreclosed and sold to satisfy the territory's lien.

This latter judgment establishing the lien priorities in favor of Alaska would appear to be the "further action" concerning priorities referred to in the other judgment of the same date. However, for reasons which are unexplained in the record, the parties and the trial court proceeded thereafter just as if this second judgment of December 13, 1956, had never been entered.

On December 20, 1956, counsel for Alaska appeared ex parte before the trial court and objected to the form of the judgment of December 13, 1956, which had been entered in favor of Lillian Schlothan. No reference was made to the other judgment of the same date in which the lien priorities were established in favor of Alaska. As a result of this hearing an order was entered on December 20, 1956, staying enforcement of the judgment in favor of Lillian Schlothan "pending the final determination of the interest of the Territory of Alaska in relation to all claims in this cause . . . ."

On January 25, 1957, a stipulation of facts pertinent to the question of lien priorities was filed. On the same day Alaska's motion for summary judgment filed on November 26, 1956, came on for argument just as if it had not already been granted on December 13, 1956. No appearance was made or brief filed on behalf of Lillian Schlothan. The matter was taken under advisement and on June 21, 1957, an extensive but unreported written opinion was handed down by the trial court.

It was held that the lien for taxes which became due after Einstoss acquired the Schlothan property, computed on the basis of cannery operations anywhere in Alaska, had priority over the purchase money mortgage. It was further held that the purchase money mortgage had priority over the lien for taxes which became due before Einstoss acquired this property. This latter ruling was based on the trial court's view that it was not the intention of the legislature to impose a lien upon after-acquired property beyond the interest of the taxpayer therein.[2]

On October 31, 1957, a judgment was entered effectuating the decision announced in the written opinion. With regard to lien priorities it was provided that the tax lien had priority over the purchase money mortgage for all cannery license taxes accruing on Eistoss' Alaskan operations in 1951. These taxes, together with penalties and interest to October 15, 1957, totaled $59,628.46. Of this sum, $26,316.20 represented cannery operations at Ketchikan, but there was no allocation as between Einstoss' operations on the Schlothan property and his other operations in Ketchikan during that year. Of the remaining sum, $32,971.82 represented 1951 cannery operations in Peterberg, Alaska, and $340.44 represented similar activities at Sitka, Alaska.

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[2]Taxes provided for under chapter 82, as amended, are not reportable and owing until January 15 of the succeeding year. See Sess. Laws Alaska (1949), chapter 82, § 3. The judgment which was entered, as described below, indicates that by the term "after-acquired" property the trial court meant property acquired after the tax became due and owing. Thus, Einstoss' acquisition of the Schlothan property on June 19, 1951, was considered to be "after-acquired" with respect to 1950 taxes, which were due and owing on January 15, 1951. But it was not considered to be "after-acquired" with regard to any 1951 taxes, because none of the taxes for that year were due and owing until January 15, 1952.

The judgment further provided that with regard to cannery licenses taxes accruing on Einstoss' 1950 operations the Schlothan purchase money mortgage had priority over the tax lien. The 1950 taxes, penalties, and interest (to October 15, 1957) thus subordinated to the mortgage aggregated $36,128.23.

In considering the appeal and cross-appeal we will assume that the second judgment of December 13, 1956, giving Alaska tax lien priority over the mortgage as to both 1950 and 1951 was improvidently entered and in effect vacated. We thus adopt the course which both parties and the trial court have followed in regarding the judgment and decree of October 31, 1957, as the only judgment establishing lien priorities.

Lillian Schlothan appeals from that part of this judgment which subordinates her mortgage to the tax lien for 1951 taxes. She presents a number of constitutional questions. She also contests the construction which the trial court placed upon the lien statute and the propriety of deciding the matter of lien priorities by summary judgment.

Turning to the constitutional questions, appellant points out that on June 19, 1951, when she sold the property to Einstoss, no tax returns had been filed by Einstoss and none were filed for him until after her foreclosure action was begun. As she also notes, it was not until November 2, 1953, nearly two years after she had recorded her mortgage, that Alaska filed notice of its tax lien. It is her contention that lack of notice of such lien prior to June 19, 1951, when she dealt with the property, constitutes a violation of the due process clauses of the Fifth and Fourteenth Amendments.[3]

Chapter 82 does not refer to a specific date on which the lien for taxes resulting from cannery operations in a particular year is deemed to attach. However, in section 4 of that chapter it is stated that "all taxes levied or provided or accruing under the provisions of this Act . . . are hereby declared to be a lien . . . ."

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[3]The validity of Alaska territorial tax statutes must be judged by the same standards of due process and of equal protection that would be applied in the case of similar legislation by a state. Alaska Steamship Co. v. Mullaney, 9 Cir., 180 F.2d 405. See, also, Hess v. Mullaney, 9 Cir., 213 F.2d 635.

Chapter 82 taxes for 1951 did not accrue until January 15, 1952, when they were first reportable and owing. It may be that they were not levied until then or the later date of November 2, 1952, when the notice of lien for 1951 was filed.[4]

Such taxes, however, were "provided" for as of the first day of 1951 in which Einstoss engaged in cannery operations. He was required to obtain a license before beginning such activity, conditioned upon the payment of a tax measured by the value of raw fish obtained for canning "during the year." See section 1 of chapter 82. Thus, as Einstoss began acquiring raw fish in 1951 for use in his cannery operations that year he became liable for a tax which was reportable and became due at a later date.

It is therefore our view that an inchoate lien for 1951 taxes under chapter 82 attached to all property owned by Einstoss as of the first day of that year in which he engaged in the business of salmon canning. With regard to the property here in question, such inchoate lien attached on June 19, 1951, this being the date on which he became the owner of that property.

When Lillian Schlothan sold the property on that date and took back a mortgage, she was aware that Einstoss had engaged in cannery operations in Ketchikan earlier that year. She is also chargeable with knowing of the lien provisions of chapter 82. Hence, on June 19, 1951, Lillian Schlothan had constructive notice that when Einstoss acquired title to her property a paramount inchoate lien would immediately attach effective as to all chapter 82 taxes, based on Einstoss' 1951 salmon canning activities before and after that date. This notice was sufficient to meet the requirements of due process.[5]

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[4]Section 1 of chapter 82, however, provides that "a license so to do on the basis of the following taxes which **are hereby levied**:" (Emphasis supplied.)

[5]See United States v. Alabama, 313 U. S. 274, 280; Minneapolis Threshing Machine Co. v. Roberts County, 34 S. D. 498, 149 N. W. 163. See, also, Anderson National Bank v. Luckett, 321 U. S. 233, 243. It has recently been held, in fact, that the lack of notice of lien is constitutionally unobjectionable even though some of the taxes were due and owing in the year before the conditional sales vendor without notice sold the property which was made subject to the lien. International Harvester Corporation v. Goodrich, 350 U. S. 537. The judgment under review in our case did not give lien priority as to taxes which were due

Appellant argues further, however, that aside from the question of notice, section 4(h) of chapter 82, as herein applied, is so unreasonable as to constitute an "affront to justice," and for this reason violates the due process clause.

The constitutional test appellant thus invokes was suggested by Mr. Justice Cardozo in Burnet v. Wells, 289 U. S. 670, 678, and is quoted with approval in International Harvester v. Goodrich, supra, page 547. Speaking of the boundaries of legislative power in the field of taxation, Mr. Justice Cardozo said: "The question is whether it [the concept reflected in the statute] is one that an enlightened legislator might act upon without affront to justice."

What affronts justice here, appellant tells us, is that the Alaska lien statute purports to impose a prior lien regardless of whether the tax was incurred in the use of the particular property against which the lien is asserted, or was incurred in connection with the use of other property anywhere in Alaska.[6]

As stated above, a proposed encumbrancer is chargeable with notice of an existing statute giving priority to a tax lien based on business activities conducted on other property. He may nevertheless, and quite understandably, fail to realize the full destructive effect such a provision may have upon the security. If he does have that realization in advance of making the loan, he may conclude that the only safe course is to refuse the loan. A general reticence to loan money on mortgage security arising from

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prior to the Schlothan property transaction. Hence, the reach of the International Harvester decision with regard to notice goes beyond what is necessary to decide the notice question in the instant case.

[6]That this is a correct interpretation of the statute and is in fact the way it has been applied here is indicated by the facts set out above. With regard to the 1951 taxes, penalties, and interest given lien priority by the judgment under review, $33,312.26 resulted from business activities outside of Ketchikan where the Schlothan property is located. There has been no allocation of the remaining $26,316.20 in 1951 taxes, penalties, and interest which were given priority, as between business activity conducted on the Schlothan property after June 19, 1951, and business activity conducted elsewhere in Ketchikan during that year. During the early part of 1951, Einstoss conducted a cannery operation on the Bertosen property in Ketchikan. In April of that year the cannery located on that property burned down.

such considerations would tend to undermine the value of property for hypothecation. Thus a statute containing such a provision may work out harshly for both mortgagor and mortgagee. It unquestionably works out harshly for at least the mortgagee in this case.

The actual or potential harshness of such a lien-priority provision has been judicially recognized in many cases. The result of such recognition, however, has not been to declare the statute unconstitutional, but to construe the statute in such a way that the constitutional question is avoided. Thus, where the statute does not in express terms extend the lien priority to include taxes arising from business activity or ad valorem assessments on other property, it has uniformly been held that no such extension was intended by the legislature.[7]

Here, however, the constitutional question must be dealt with. The Alaska statute explicitly makes a license tax lien prior, paramount, and superior "to all other liens, mortgages, hypothecations, conveyances, and assignments, upon all the real and personal property of the person . . . liable therefor. . . ."

On the authority of International Harvester v. Goodrich, 350 U. S. 537, the constitutionality of such a statute challenged on the ground of unreasonableness must be upheld. In that case the Cardozo test of constitutional reasonableness laid down in Burnet v. Wells, supra, was quoted and found to have been met. Specifically, it was held that a statute which gave tax lien priority over conditional sales contracts on three trucks, with regard to a highway use tax measured by the operation of the carrier's entire fleet, is not violative of the due process clause on the ground of unreasonableness.

Appellant argues that International Harvester is to be distinguished from the instant case because the tax there in question, unlike the Alaska tax, was imposed for the purpose of

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[7] See Scottish American Mortgage Co. v. Minidoka County, 47 Ida. 33, 272 Pac. 498, and cases therein collected, dealing with an analogous statutory provision assertedly imposing a personal property tax lien upon the taxpayer's real property, with priority over pre-existing encumbrances on the latter property.

compensating the state for the use of the highways. The court there pointed out that the burden placed on the highways by the operation of the trucks which were subject to the conditional sales contracts "has been precisely the same as though the carrier had held unencumbered title to the trucks."

In our opinion, however, the circumstance just mentioned does not adequately distinguish International Harvester from the case before us. The New York highway use tax involved in International Harvester was computed on a graduated scale beginning at six mills per mile for vehicles of between 18,001 and 20,000 pounds. Thus it would have been practicable to compute the tax arising from the operation of each truck, and indeed this may have been the practice. This being so, the fact that the operation of a truck encumbered by a conditional sales contract is as hard on the highways as an unencumbered truck would not seem to be a good reason for saddling the former with tax liens arising from the operation of the latter.

It was emphasized in International Harvester that the lien-priority statute there in question was enacted for the purpose of meeting a practical tax-collecting problem. The court closed its opinion with these words, ". . . the tax is owed by the carrier and the need for an effective lien to enforce it is all the more necessary where, as here, the tax cannot be computed or readily collected in advance." The same underlying consideration seemed to have dictated the conclusion reached in the Minneapolis Threshing Machine Co. case, supra. The court there said:

> "It is essential, in order that the state may collect its revenue and carry on the public business, to make such a tax a paramount lien . . . ."

We take judicial notice of the great importance of the salmon canning industry in Alaska as compared to many other industries concerning which territorial license tax liens may or may not have been provided for. Alaska here asserts and appellant does not deny that license taxes assessed against salmon carriers are difficult to collect because the business is seasonal, substantial taxes may accrue in a brief period, many canneries operate on very little capital, and the business is to a considerable extent itinerant.

Thus essentially the same primary considerations which led the Supreme Court in International Harvester, and the South Dakota Supreme Court in Minneapolis Threshing Machine, to uphold the lien-priority statutes there in question are present here.

In the latter case and in State v. Wynne, 134 Tex. 455, 133 S.W.2d 951, the view is expressed that if a lien-priority statute seems unjust and needs amending the remedy should come from the legislature. This is just what has taken place in New York following the decision in International Harvester, and in Kansas following the decision in Freuhauf Trailer Co. v. State Corporation Commission, 149 Kan. 465, 87 P.2d 641.[8] At the trial court hearing the assistant attorney general of the Territory of Alaska expressed the hope of his office that the legislature of Alaska would amend the law to delete this harsh provision. The legislature also has within its power, if it wishes to do so, to return to Mrs. Schlothan the sums collected at the expense of her mortgage.

We conclude that imposition of tax lien priority over the Schlothan purchase money mortgage as to taxes measured by Einstoss' 1951 operations throughout Alaska is not such an affront to justice that it must be set aside by virtue of the due process clauses of the Fifth and Fourteenth Amendments.

Appellant also attacks the constitutionality of Sess. Laws Alaska (1949), chapter 82, § 4(h), as given effect in the judgment under review, on the ground that it denies to her the equal protection of the laws. Here again, attention is drawn to the fact that the statute subjects contract encumbrancers to a prior lien for taxes measured by cannery operations conducted on property other than that which is encumbered. It is asserted that persons who hold security interests in property owned by individuals not engaged in the fishing industry are not subjected to a comparable

[8] McKinney's N. Y. Laws, Tax Law, § 506, which was the lien-priority statute upheld in the International Harvester case, was amended, effective September 1, 1957 (L. 1957, c. 649, § 1) to provide that, subject to certain conditions not material here, the lien of the highway use tax "shall be subject to the lien of any indebtedness secured by a chattel mortgage or conditional sales agreement existing against such motor vehicle or vehicular unit previous to the time when such tax lien became a lien . . . ." The Kansas lien-priority statute which was upheld in Freuhauf Trailer Co. v. State Corp. Commission, supra, was later repealed. Kan. Laws 1955, c. 294.

lien priority. Accordingly, it is argued, persons in the position of Lillian Schlothan are placed in an unreasonable and burdensome classification not imposed upon other persons who hold security interests with respect to property not owned by individuals engaged in the fishing industry.

A substantially similar contention was advanced in State ex rel. Veatch v. Franklin, 163 Ore. 500, 98 P.2d 724. The statute there in question required that poundage fees be paid on smelt, crabs, clams, oysters, salmon, and other anadromous fish. No statutory lien to secure the payment of such fees was provided for, however, except in the case of salmon and other anadromous fish. Creditors of a cannery operator whose judgment liens against his property were subordinated to the lien for poundage fees challenged the constitutionality of the lien provision. They argued that as persons who dealt with and extended credit to the salmon canner they were discriminated against in favor of those who extended credit to persons in the other classes and who are not subjected to the hazards of the state's lien.

Disposing of this contention, the supreme court of Oregon said:

> "It is sufficient answer to these claims, assuming that a lien creditor has any standing to assert them, to say that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited. Savage v. Martin, Or., 91 P.2d 273, 287. The legislative discretion in such matters will not be disturbed by the courts unless the classification is plainly and manifestly arbitrary and without any reasonable basis. Here, the comparatively great importance in this state of the anadromous fish industry would justify the legislative decision to authorize a lien in the one case and not in the other. See 12 Am. Jur., 'Constitutional Law', 164, § 485."

Not only is this a sound statement of the controlling principle, but the factual considerations which led to rejection of the equal protection argument in that case are closely paralleled by the facts before us here. In our opinion, the fact that Alaska has not imposed a lien to secure unpaid license fees on other businesses does not deny a creditor of a salmon canner equal protection of the laws.

As her final constitutional argument, appellant urges that Sess. Laws Alaska (1949), chapter 82, § 4(h), imposing the lien priority here in question impairs contracts such as her purchase money mortgage, in violation of Art. I, § 10, of the Constitution.

The clause of Art. I, § 10, of the Constitution, forbidding the passage of laws impairing the obligation of contract, has reference only to a state law enacted after the making of the contract whose obligation is asserted to have been impaired. Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 446.

Chapter 82 was enacted and became effective in 1949. It was amended by Sess. Laws Alaska (1951), chapter 113, which became effective March 24, 1951. Lillian Schlothan's mortgage was executed June 19, 1951. The obligations of this mortgage were therefore not impaired by the lien statutes in question but were entered into subject to those statutes. See Abilene National Bank v. Dolley, 228 U. S. 1, 5.

In appellant's specifications of error, but nowhere else in her brief, it is asserted that, properly construed, the lien statutes under discussion apply only with respect to the taxpayer's equity in the property subjected to the lien. If the statutes were given this interpretation, Lillian Schlothan's interest, represented by the unpaid portion of her mortgage, would not be subordinated to the tax lien.

Chapter 82, § 4(h), imposing the lien, makes it applicable "upon all the real and personal property of the person . . . liable therefor . . . ." Appellant would apparently change this to read "upon the taxpayer's equity in all the real and personal property of the person . . . liable therefor." But this construction is negated by preceding language in the same section specifying that such lien shall be "prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments . . . ." Hence, it is the total value of the property and not just the taxpayer's equity therein which is intended to be reached by the lien imposed by section 4(h).

Finally, appellant argues, this case should not have been disposed of by summary judgment because in her view there are genuine issues as to material facts.

Under Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A., a summary judgment may not be entered if the pleadings, depositions, admissions, and affidavits on file show that there is a genuine issue as to any material fact.

Appellant asserts that there are genuine issues of fact as to the amount of taxes which are attributable to cannery operations on the Schlothan property as distinguished from Einstoss' other properties in Alaska. But these are not material facts. Under the view we take of the case, as stated above, the tax lien has priority over the Schlothan mortgage with regard to taxes measured by Einstoss' 1951 cannery operations anywhere in Alaska.

It is further contended that there is a genuine issue of fact as to the intention of the territorial legislature in passing the statute in question. In this connection appellant asserts that she was denied the right to subpoena committee members of the territorial legislature who drafted the legislation, and to produce legislative notes and discourse concerning the legislation.

The interpretation of a statute presents a question of law. Under certain circumstances the court may seek aid in deciding this question by examining legislative history. The testimony of legislators given subsequent to the enactment is not legislative history. 2 Sutherland Statutory Construction, 3d ed., 505, § 5013.

Legislative notes and discourse during the progress of legislative deliberation is legislative history in the broad sense if published and available to the public. Private notes and conversations, however, have no higher standing than subsequent testimony. Appellant does not contend that there are any published and available legislative notes and discourse. Nor does she deny Alaska's assertion that legislative notes and minutes of subcommittees are nonexistent in Alaska. But even were such materials available, they could not appropriately be produced as evidence in the trial, but only as appendices or supplements to briefs.

In our opinion appellant has failed to establish that there were any genuine issues as to material facts which precluded disposition of this case by summary judgment.

We turn now to Alaska's cross-appeal. As previously noted, the judgment, while giving Alaska's tax lien priority over the Schlo-

than mortgage with regard to 1951 taxes, subordinated the lien to that mortgage with regard to 1950 taxes.

The trial court found no constitutional impediment to the imposition of tax lien priority with regard to taxes for the year prior to the time Lillian Schlothan sold her property and took a mortgage. But it held that the legislature, in enacting Sess. Laws Alaska, chapter 82, did not intend to impose a lien upon after-acquired property beyond the interest of the taxpayer therein. Alaska asks us to reverse the trial court in this regard and to subordinate the Schlothan property to the tax lien for 1950 taxes as well as 1951 taxes.

The 1951 taxes, penalties, and interest for which Alaska was given priority amounted to $59,628.46 as of October 15, 1957. This far exceeds the value of the Schlothan property. It follows, as counsel for Alaska conceded on oral argument, that if Alaska prevails on the cross-appeal it will not receive one dollar more than it will obtain under the present judgment. Accordingly, it is not aggrieved by the judgment and has no standing to cross-appeal.

The cross-appeal is dismissed. The judgment is affirmed.

After this case was submitted en banc, the death of Circuit Judge James Alger Fee occurred on August 25, 1959.

(Endorsed:) Opinion. Filed Feb. 9, 1960.

Frank H. Schmid, Clerk.

Appendix III

United States Court of Appeals for the Ninth Circuit

Lillian Schlothan, Appellant, vs. Territory of Alaska, Appellee.	No. 15,817
Territory of Alaska, Appellant, vs. Lillian Schlothan, Appellee.	

JUDGMENT

Appeals from the District Court for the District of Alaska, First Division.

This cause came on to be heard from the District Court for the District of Alaska, First Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the cross-appeal of the Territory of Alaska, be, and hereby is dismissed, and that the Judgment of the said District Court in this cause, be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: February 9, 1960
Frank H. Schmid, Clerk.

Appendix IV

TERRITORY OF ALASKA
Office of the Auditor
Juneau, Alaska

CHAPTER 82
AN ACT

[H. B. 3]

Imposing license taxes upon salmon canneries and other businesses in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties; repealing paragraphs (a) to (g), inclusive, of subsection 7th of Section 35-1-11, Alaska Compiled Laws Annotated, 1949, and subsections 8th and 9th of the same section; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Businesses in Alaska Fisheries Requiring Licenses: Amounts Thereof. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 4 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December of the license year.

(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average

prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

(b) Herring processing plants in the business of canning, curing, salting, freezing or making meal or oil or other processed product including sale of bait herring by either processing plant or bait herring fisherman: An annual license tax equal to 1 percent of the value of the raw herring. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to herring caught in company owned or subsidized boats operated by employees of the processor or under lease or other agreement.

(c) Crab canneries, both shore based and floating: An annual license tax equal to 2 percent of the value of the raw crabs. The raw crab value for the purpose of this license shall be the actual price paid for same either by cash or its equivalent according to the provisions above set forth for herring processing plants.

(d) Clam canneries: A license tax equal to 2 percent of the value of the raw clams, with value to be determined according to the provisions above set forth for crab canneries will be levied on razor clams.

(1) Butter clams shall be taxed in the same manner at the rate of 1 percent of the value of raw clams.

Section 2. Application for an Issuance of License: Payment of Tax. During any year, including the year 1949, before engaging in any business mentioned in Section 1 of this Act, application so to do must first be filed with the Territorial Tax Commissioner, accompanied by an initial fee of $25.00. A separate initial fee shall be required for each plant specified in the application to be covered by the license. In such application, which may be made upon forms furnished by the Tax Commissioner, the applicant shall state his or its name, the line of business to be licensed, place or places where said business is to be carried on and such other facts as the Tax Commissioner prescribes. The applicant shall also state that he agrees to pay the license tax and will make a true return and will pay to the Tax Commis-

sioner such tax on or before the fifteenth of the next ensuing January. Upon the receipt of the application in proper form accompanied by the initial fee, the Tax Commissioner shall issue the license as of the date the application is filed or mailed, and the applicant may carry on the business from and after the date the application was actually made.

Section 3. Taxpayer's Duty as to Returns, Records, Statements, etc.: Time to Pay Tax: Tax Commissioner's Return.

(a) Requirement for Making Returns: Any person, firm or corporation subject to taxes under this Act shall make a return stating the value of raw fisheries products processed during the license year, computed as required by this Act, and such other information for the purpose of carrying out the provisions of this Act as the Tax Commissioner may by regulation prescribe. The return shall show the license number and shall be signed by the taxpayer or his authorized agent, under the penalties of perjury. In cases where receivers, trustees, or assigns are operating the property or business, such receivers, trustees, or assigns shall make returns for the person, firm or corporation. Any tax due on the basis of such returns shall be collected in the same manner as if collected from the person, firm or corporation of whose business they have custody and control.

(b) Time and Place for Filing Returns:

(1) Returns shall be made on the basis of the calendar year to the Tax Commissioner at Juneau, on or before the 15th day of January following the close of the year.

(2) The Tax Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he may prescribe.

(c) Time for Payment: The total amount of tax imposed by this Act shall be paid on or before the 15th day of January following the close of the calendar year.

(d) Records by the Taxpayer: Every person, firm or corporation prosecuting or attempting to prosecute or engaging in any business covered by this Act shall keep such records, render under oath such statements, make such returns, and comply with such

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rules and regulations, as the Tax Commissioner may from time to time prescribe.

(e) Whenever in the judgment of the Tax Commissioner it is necessary, he may require any person, firm or corporation, by notice served upon him, to make a return, render under oath such statements, or keep and display to him or his authorized deputy such records as he deems sufficient to show the amount such person is liable for as tax under this Act. If any person, firm or corporation fails to make and file a return at the time prescribed by law or by regulations made under authority of law, or makes, wilfully or otherwise, a false or fraudulent return, the Tax Commissioner shall make the return from his own knowledge and from such information as he can obtain through testimony and otherwise. Any return so made and subscribed by the Tax Commissioner shall be prima facie good and sufficient for all legal purposes.

Section 4. Violations and Penalties: Deficiency in Tax and Interest Thereon: Lien.

(a) Failure to File Returns; to Obtain a License, Submit Information or Pay Tax. Any person required under this Act to pay any tax, or required to make a return, keep or display any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who wilfully fails to obtain such license, pay such tax, make such return, keep or display such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $1,000.00, or imprisoned for not more than one year, or both, together with the cost of prosecution.

(b) Perjury. Any person who wilfully makes and subscribes a return which he does not believe to be true and correct as to ever material matter shall be guilty of a felony, and upon conviction thereof, shall be subject to the penalties prescribed for perjury under the laws of the Territory of Alaska.

(c) Person Defined. The term "person" as used in this section includes an officer, agent or employee of a corporation or a mem-

ber, agent or employee of a partnership, who, as such officer, agent, employee or member, is under duty to perform the act in respect of which the violation occurs.

(d) Failure to File Return. In case of any failure to make and file a return required by this Act within the time prescribed by law or prescribed by the Tax Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the tax: 5 percent if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax, unless the tax has been paid before discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax.

(e) Negligence. If any part of any deficiency in the tax is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 percent of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid in the same manner as if it were a deficiency, except that paragraph (g) relating to interest on deficiencies shall not be applicable.

(f) Fraud. If any part of any deficiency in the tax is due to fraud with intent to evade tax, then 50 percent of the total amount of the deficiency (in addition to such deficiency) shall be assessed and collected.

(g) Interest. Interest upon the amount determined as a deficiency in the tax shall be assessed at the same time as the deficiency, shall be paid upon notice and demand by the Tax Commissioner, and shall be collected as a part of the tax, at the rate of 6 percent per annum from the time prescribed for payment of the tax to the date the deficiency is paid.

(h) Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon, are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assign-

ments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business; Provided, however, that the special remedy provided for the recovery of license taxes, as herein set forth, shall not be deemed exclusive of any other remedy, civil or criminal, or both, now provided by law for the recovery of license taxes.

Section 5. Severability Clause. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 6. Paragraphs (a) to (g), inclusive, of subsection 7th of Section 35-1-11, Alaska Compiled Laws Annotated, 1949, and subsections 8th and 9th of Section 35-1-11, Alaska Compiled Laws Annotated, 1949, are hereby repealed.

Section 7. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 23, 1949.

TERRITORY OF ALASKA

Office of the Auditor

Juneau, Alaska

CHAPTER 113

AN ACT

[S. T. R. C. S. S. B. 22]

To amend Chapter 82, Session Laws of Alaska 1949, relating to a license tax on salmon canneries; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Subsection (a) of Section 1 of Chapter 82, Session Laws of Alaska 1949, is hereby amended to read as follows:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 24, 1951.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 860

LILLIAN SCHLOTHAN, *Petitioner*,

v.

TERRITORY OF ALASKA, *Respondent*.

TERRITORY OF ALASKA, *Petitioner*,

v.

LILLIAN SCHLOTHAN, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

1. The opinion of the United States District Court for the District of Alaska, Division Number One at Ketchikan is set forth in Appendix I of the Petition.

2. The opinion of the United States Court of Appeals for the Ninth Circuit entered February 9, 1960, is set forth in Appendix II of the Petition.

3. The judgment of the United States Court of Appeals, Ninth Circuit, entered the 9th day of February, 1960, is set forth in Appendix III of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The question is adequately set forth in the Petition.

STATEMENT OF THE CASE

Early in 1951 Sigmund Einstoss entered into negotiations leading to the purchase of certain tideland property and the improvements thereon from Lillian Schlothan. At the time Einstoss was engaged in the fishing and canning business, including the operation of a salmon cannery, and needed additional space for storage and warehouse purposes. Schlothan was aware of the cannery operations of Einstoss. On June 19, 1951 petitioner executed a quit claim deed to the property, taking a purchase money mortgage as security for the payment of the balance due under the terms and conditions of sale.

After the acquisition of the Schlothan property Einstoss secured cannery equipment and used the buildings thereon for cannery purposes as well as using the property for storage and warehouse purposes. During 1951 Einstoss canned salmon on the property.

On November 2, 1953 the Territory of Alaska filed a notice of tax lien in the Office of the Recorder for the Precinct of Ketchikan where this property is located. The Alaska lien is based on the provisions of the commercial fisheries license tax provided for in Chapter

82, Section 4(h), Session Laws of Alaska, 1949, as amended by Chapter 113, Session Laws of Alaska, 1951.

Einstoss defaulted in the terms of his mortgage and on March 29, 1954, proceedings were instituted to foreclose the mortgage. Alaska was joined in the foreclosure proceeding because of its claimed interest in the property by virtue of its tax lien. The lien, notice of which was recorded November 2, 1953, was for taxes accruing in the years 1950 and 1951 in the total amount of $59,582.92, plus penalties and interest. Alaska filed a cross claim against Einstoss for this amount and prayed for enforcement of its lien. Alaska also sought a decree foreclosing its lien and a declaration that its lien was prior and superior to any right, title, or interest of Lillian Schlothan in the property.

On December 13, 1956 the trial court entered a judgment in favor of Lillian Schlothan against Einstoss in the sum of $14,800.12, and costs. It was further provided that the relative priority of the Schlothan lien and the Alaska lien would be subsequently determined by the court.

On January 25, 1957 a stipulation of facts pertinent to the question of lien priorities was filed. On the same day Alaska's motion for summary judgment filed on November 26, 1956 was argued. On June 21, 1957 the trial court handed down an unreported written opinion (Appendix I of Petition.) It was held that the lien for taxes which became due *after* Einstoss acquired the Schlothan property had priority over the purchase money mortgage. It was further held that the purchase money mortgage had priority over the lien for 1950 taxes which became due before Einstoss ac-

quired this property. On October 31, 1957, a judgment was entered effectuating the decision announced in this opinion.

Lillian Schlothan appealed from that part of the trial court's judgment which subordinated her mortgage to the tax lien for 1951 taxes. A cross appeal was filed by Alaska from that part of the judgment which subordinated Alaska's lien for 1950 taxes to the Schlothan mortgage.

On February 9, 1960 the United States Circuit Court of Appeals for the Ninth Circuit handed down its decision affirming that part of the decision of the lower court which held that Alaska's lien for 1951 taxes was superior to the Schlothan mortgage. Since the lien for 1951 taxes far exceeded the value of the property, the court held that Alaska was not aggrieved by the trial court's judgment with respect to 1950 taxes and dismissed Alaska's cross appeal.

ARGUMENT

I. The statute does not violate the due process clauses of the United States Constitution

The petitioner asserts that Chapter 82, Session Laws of Alaska 1949, violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

(a) The first contention set forth by petitioner is that the statute fails to provide the petitioner with notice of a lien. This contention is erroneous in that it fails to recognize the well established principle that the statute itself is constructive notice. This principle was aptly stated in the opinion of the trial court as follows:

"It is well established that the statute itself is constructive notice of the rights and obligations which it confers.

"In *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 243, (1944), the court held:

'All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. *Reetz* v. *Michigan*, 188 U.S. 505, 509; *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting land owners are familiar examples. *Huling* v. *Kaw Valley Co.*, 130 U.S. 559, 563-564; *Ballard* v. *Hunter*, 204 U.S. 241, 254-257, 262.'" (Page 12, Appendix I of Petition)

(b) The petitioner next argues that the statute is unconstitutional in that it permits the public to be deceived into believing that the prior years' tax has been paid by the issuance of a license.

Section 2 of Chapter 82, Session Laws of Alaska, 1949, provides in part:

"Upon the receipt of the application in proper form accompanied by the initial fee, the Tax Commissioner *shall* issue the license as of the date the application is filed or mailed, and the applicant may carry on the business from and after the date the application was actually made." (Emphasis added) (Page 33, Appendix IV of Petition)

Payment of the prior years' taxes is not made a prerequisite to the issuance of a license but on the contrary the statute expressly provides that the applicant may carry on the business from the date the application is

made. Thus, contrary to petitioner's assertion, the statute is not misleading and does not provide any basis for an assumption that the prior years' taxes have been paid when a new license is issued.

In the instant case Lillian Schlothan dealt with Einstoss on June 19, 1951. Taxes for the year 1951 were not due until January 15, 1952. Since the judgment was limited to the 1951 taxes, penalties, and interests, petitioner is not aggrieved by the judgment even if petitioner had erroneously assumed that taxes prior to 1951 had been paid previous to the issuance of the license for 1951. (Page 29, Appendix II of Petition).

(c) Petitioner next argues that the statute is so unreasonable as to constitute an affront to justice and seeks to distinguish the instant case from this court's holding in *International Harvester Credit Corp.* v. *Goodrich*, 350 U.S. 537.

In *International Harvester Credit Corp.* v. *Goodrich*, *supra*, this court upheld the validity of the New York lien statute which is similar in extent to Section 4(h) of Chapter 82, SLA 1949. The New York statute is set forth in the opinion of the trial court. (Page 9, Appendix I of Petition). In the *Goodrich case* this court recognized the necessity of the New York lien priority statute for the purpose of meeting a practical tax collecting problem, particularly where, as in the instant case, the tax cannot be computed or readily collected in advance. The necessity for the Alaska statute is clearly shown in the opinion of the United States Court of Appeals, which states as follows:

> "We take judicial notice of the great importance of the salmon canning industry in Alaska as compared to many other industries concerning which

territorial license tax liens may or may not have been provided for. Alaska here asserts and appellant does not deny that license taxes assessed against salmon carriers are difficult to collect because the business is seasonal, substantial taxes may accrue in a brief period, many canneries operate on very little capital, and the business is to a considerable extent itinerant.

"Thus essentially the same primary considerations which led the Supreme Court in International Haryester . . . to uphold the lien-priority statutes there in question are present here." (Page 24, Appendix II of Petition)

Petitioner seeks to distinguish the instant case from the *Goodrich case* upon the ground that no benefit seems to devolve upon Schlothan from the tax as would upon a truck manufacturer who depends upon the upkeep of the highways for his market. The necessity of such a benefit to the vendor was expressly rejected by this court in the *Goodrich case* at page 546 of the opinion.

"While it is not a condition of the validity of the State's lien, it is obvious that vendors of trucks, . . . derive substantial benefits from . . . maintenance of . . . highways . . ."

It is submitted that the validity of the Alaska statute is clearly shown by this court's opinion in the Goodrich case.

II. The statute does not violate the equal protection of the law clauses of the United States Constitution

(a) Petitioner contends that the Alaska lien statute is unconstitutional in that it denies equal protection of the laws to the petitioner. The reason advanced by petitioner in support of this contention is that the stat-

ute subjects contract encumbrancers or creditors dealing with persons engaged in the commercial fishing business to a prior lien for taxes, but does not subject other contract encumbrancers or creditors doing business with persons engaged in other industries in Alaska with similar burdens.

This argument of petitioner was aptly rejected by the United States Court of Appeals. After discussing the case of *State ex rel. Veatch* v. *Franklin*, 163 Ore. 500, 98, p. 2d 724, the court quoted from the Oregon decision as follows:

> "It is sufficient answer to these claims, assuming that a lien creditor has any standing to assert them, to say that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited. *Savage* v. *Martin*, On., 91 P. 2d of 273, 287. The legislative discretion in such matters will not be disturbed by the courts unless the classification is plainly and manifestly arbitrary and without any reasonable basis. Here, the comparatively great importance in this state of the anadromous fish industry would justify the legislative decision to authorize a lien in the one case and not in the other. See 12 Am. Jur., 'Constitutional Law,' 164 § 485." (Page 26, Appendix II of Petition)

The United States Circuit Court of Appeals further stated "not only is this a sound statement of the controlling principle, but the factual considerations which led to rejection of the equal protection argument in that case are closely paralleled by the facts before us here." (Page 26, Appendix II of Petition).

The importance of the salmon canning industry and the well known difficulty encountered in collecting this

tax has prompted the legislature to make this classification. The United States Circuit Court of Appeals took judicial notice of the great importance of the salmon canning industry in Alaska as compared to other industries. The court also took judicial notice of the difficulties encountered in collecting the tax because the business is seasonal, substantial taxes may accrue in a brief period, many canneries operate on very little capital and the business is to a considerable extent itinerant. It is submitted that the classification is reasonable and that the United States Court of Appeals correctly disposed of this contention raised by the petitioner.

III. The decision below is clearly correct and because of the unique fact situation presented would be of little importance to anyone other than the litigants

The trial court's decision, which was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, is clearly within the holding of this court in *International Harvester Credit Corp.* v. *Goodrich, supra.* The petitioner has failed to disclose any decision by this court which would even suggest a contrary result.

In the instant case the taxes assessed for the year 1951 alone far exceeded the total value of the property. For this reason it was not necessary to decide the more difficult question dealing with the validity of a tax lien for taxes accrued prior to acquisition of the property by the taxpayer. In the instant case the petitioner not only had constructive knowledge of the tax lien but in addition had actual knowledge at the time of sale that the purchaser was engaged in the salmon canning business. Therefore, the importance of this decision is necessarily limited and would not answer more im-

portant questions which might arise in the event of subsequent litigation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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